Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

RIO PETROLEUM, INC.,

Petitioner,

versus

YOLANDA N. BROWN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

Question Presented

Was it error for the United States Fifth Circuit Court of Appeals to uphold the District Court's denial of Petitioner's initial and renewed Rule 50 motions regarding Respondent's disparate treatment case by imputing an unlawful discriminatory motive to the Respondent's direct supervisor, who was the sole decision-maker, in the absence of any evidence of racial bias or animus on the part of the supervisor?

List of Parties

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States:

1.Rio Petroleum, Inc.,
Defendant/Appellant/Petitioner

2.John Walker, Jr., Defendant/ Appellant

3.Barrett W. Pierce, Defendant

4.Yolanda N. Brown,
Plaintiff/Appellee/Respondent

5.Marty L. Rowley, Attorney for the
Defendants/Appellants/ Petitioner

6.Shawn D. Twing, Attorney for the
Defendants/Appellants/ Petitioner

7.Muakum J. Sherman, Attorney for the
Plaintiff/Appellee/Respondent

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Opinions Below

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. It is attached as an appendix.

Jurisdiction

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 12, 2001, Petition for Panel Rehearing denied July 20, 2001, by a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

The statute construed and applied in this case is Title VI of the Civil Rights Act, as amended, 42 U.S.C. 2000e-2(A)(1) (West 1999) which states in relevant part that, "[i]t shall be an unlawful employment practice for an employer - to . . . discriminate against any individual with respect to [her] . . . terms, conditions or privileges of employment because of such individual's race . . . "

Statement of the Case

A jury in the United States District Court for the Northern District of Texas, found that Petitioner, Rio Petroleum, Inc., had discriminated against Yolanda N. Brown, Respondent, regarding certain terms, conditions and privileges of her employment on account of her race. The United States Court of Appeals for the Fifth Circuit affirmed holding that even though no evidence of racial bias or race based motivation existed with respect to Ms. Brown's supervisor, Carol Pierce, an unlawful motivation could be imputed to her on the basis of certain comments attributed to two other corporate officers of Rio Petroleum, Inc. who had

no influence or input regarding the personnel matters at issue in this case.

(Facts)

A. Course of Proceedings and Disposition Below

Yolanda N. Brown ("Respondent" or "Ms. Brown") filed this action pursuant to Title VII of the Civil Rights Act of 1964, as amended ("Title VII") and Texas common law. Specifically, Respondent brought twelve distinct claims of race and gender discrimination, race and sexual harassment and retaliation against Rio Petroleum, Inc. ("Rio Petroleum" or Petitioner") (R. Vol. 4, pp. 000337 - 000340). In addition, she pursued a state law claim of intentional infliction of emotional distress against Barrett Pierce ("Mr. Pierce"), who is the President of Rio Petroleum, and a state law claim of assault and battery against, John Walker, Jr. ("Mr. Walker"), who is a Vice-President of Rio Petroleum.

At the close of its case-in-chief, Petitioner, Mr. Walker and Mr. Pierce moved for Judgment as a Matter of Law ("JMOL") pursuant to Federal Rule of Civil Procedure 50. The Court granted these Motions, except for a portion of Respondent's disparate treatment claim against Rio Petroleum and the assault and battery claim against Mr. Walker. (R. EX. 4, 265-66) As a result of the District Court's ruling, Barrett Pierce was dismissed as a party Defendant along with Respondent's allegations of sexual harassment and intentional infliction of emotional distress against him.

After presenting their defense, Rio Petroleum and Mr. Walker renewed their JMOL Motions on the remaining claims pending against them. These Motions were denied and the claims were submitted to the jury. (R. Vol. 4, p. 490). The jury returned a verdict in the Respondent's favor on her

disparate treatment claim against Rio Petroleum and on her assault and battery claim against Mr. Walker. (RE. EX. 3)

On March 10, 1999, Rio Petroleum and Mr. Walker again renewed their JMOL Motions. In addition, they both filed Motions for Remittitur and New Trials. (R. Vol. 2, p. 000450) By Order entered on September 30, 1999, the Court granted in part and denied in part Rio Petroleum's Motion for Remittitur by reducing the jury verdict against the company to the level of the applicable statutory cap on compensable damages. (R. Vol. 2, p. 000450) The Court denied the remainder of the Petitioner's Motions. Final Judgment was entered on September 30, 1999. The District Court has never ruled on this Motion. Petitioner filed a timely Notice of Appeal on October 25, 1999 seeking a review of the District Court's September 30, 1999 Order and the Final Judgment entered against it. On appeal, the Fifth Circuit reviewed Respondent's claim in disparate treatment concerning the terms and conditions of her employment. In an unpublished opinion issued on April 12, 2001, the Court found sufficient evidence to uphold the jury's verdict on this claim. Petitioner's subsequent petition for panel rehearing was denied by order dated July 20, 2001.

B. Stipulated Facts and Facts Relevant to Appellate Review

Before trial, the parties stipulated to a "factual narrative" that was read to the jury. (R. Vol. 4, pp. 62-65) The relevant portions of that narrative are set forth in the following paragraphs in order to aid this Court in understanding the factual background of this case.

> "Rio Petroleum is a Texas corporation engaged in the business of exploration, production and sale of oil and natural gas. Rio Petroleum's corporate offices are located in

Amarillo, Texas. Barrett Pierce is the president of Rio Petroleum. Defendant John Walker, Jr. is a vice-president of the corporation. At all times relevant to this lawsuit, Rio Petroleum employed more than fifteen (15), but less than twenty (20) employees. Further, Rio Petroleum had adopted policies prohibiting race discrimination and harassment, including sexual harassment. These policies also contained a procedure for reporting suspected violations. A copy of the company's policy handbook was provided to all Rio Petroleum employees, including Ms. Brown.

Yolanda Brown was hired by Rio Petroleum on January 1, 1992 to be a member of the company's office staff. Specifically, Appellee was hired to perform the duties of a receptionist, production clerk and filing clerk. She was also expected to perform other clerical duties on an "as needed basis." Because of Rio Petroleum's small size, office employees were required to perform various office tasks as the need arose. Consequently, Ms. Brown did not have a specific job title. While employed by Rio Petroleum, Appellee's direct supervisors were Carol Pierce and Jim Marcum. Both Mrs. Pierce and Mr. Marcum are vice-presidents of the company. Mrs. Pierce is the wife of Barrett Pierce.

During her employment, Ms. Brown received raises in her salary. She also received incentive bonuses and participated in company social functions which included dinner parties and Christmas gift exchanges.

Throughout her employment, Ms. Brown was assigned various job duties within the office. These duties included typing documents, filing documents, answering the phone, taking phone messages, making bank deposits and running errands. During her employment, Ms. Brown was counseled about her job performance. Eventually, job duties were taken away from Ms. Brown and assigned to other employees. Rio Petroleum also installed an automated phone system to take in and record business calls.

Ms. Brown's employment was terminated effective September 13, 1996. She was notified of her termination in a meeting with Mr. Marcum and Mrs. Pierce. During this meeting, Ms. Brown was given a written separation notice. She was advised in this writing that:

> [i]n your four years of employment with Rio, we have endeavored to have you perform various tasks. However, other than arranging birthday/party celebrations and attending receptionist activities during conference meetings, you failed to successfully perform and master tasks given you. These inabilities resulted in the transference of work and responsibilities to others. Recall that I have had several conversations with you in the past regarding your job performance, and I have seen no improvement. Therefore, we must terminate your employment effective immediately.

This letter was signed by Mrs. Pierce and sent to Mr. Pierce, Mr. Marcum, and Mr. Walker, and placed in Ms. Brown's employment file. Ms. Brown was not replaced by a current employee of Rio Petroleum, except that her job duties had been assigned to other employees, nor was any other person hired to fill her job position.

> After her employment with Rio Petroleum ended, Ms. Brown collected the maximum amount unemployment benefits allowed by law. She later returned to school on a full-time basis and works part-time. She is currently a full-time student at West Texas A & M University. For support, Ms. Brown works part-time, receives child support payments and financial assistance from her family.

(R. Vol. 4, pp. 62-65).

In addition to the stipulated narrative facts, additional facts relevant to the resolution of this appeal were also established at trial. It was established at trial that Respondent was hired by Carol Pierce and Jim Marcum. (R. Vol. 4, p. 354). It was further established and undisputed that all final personnel decisions regarding Respondent's employment were made by Mrs. Pierce. (R. Vol. 4, p. 435).

Reason for Granting the Writ

> **The Fifth Circuit's decision exceeds the boundaries of established employment discrimination law by allowing courts to impute discriminatory motivation to the sole decision-maker in a race discrimination case without any direct or circumstantial evidence of racial bias on the part of the decision maker or evidence that some other party motivated by racial animus exerted leverage or influence over the decision-maker regarding the decisions at issue. This Court should review this case to decide under what circumstances imputation of an unlawful motivation is**

justified and what quantum of evidence is required to avoid a Rule 50 motion.

This is a race discrimination case in which the Respondent contends that certain decisions made regarding the terms and conditions of her employment were unlawfully based, in whole or in part, on her race. Specifically, the decisions at issue involve the reassignment of certain job duties once performed by the Respondent and the fact that she was counseled by her supervisor regarding her receipt of personnel phone calls while at work. (See Appendix 1a). At trial, it was undisputed that Carol Pierce alone made these decisions. At the times relevant to this case, she was the company's Vice-President in charge of personnel matters, and was Respondent's direct supervisor with final decision making authority regarding Respondent's employment. (*Id.*)

It was further established at trial that no direct or circumstantial evidence of racial bias or animus existed regarding Mrs. Pierce. In fact, at trial Respondent specifically testified that she did not believe Mrs. Pierce was motivated by racial bias respecting decisions made concerning her employment. (R.EX. 13) On the contrary, Respondent testified that she and Mrs. Pierce had a good working relationship that changed only when Respondent allegedly reported an incident of sexual harassment regarding Mr. Pierce. (R.EX. 13) In short, this case raises the problem associated with imputing racial bias and animus to a neutral decision-maker which may, and in this case, did result in a finding of intentional discrimination where, in fact, no such motivation existed. Such a result runs counter to the very letter and spirit of Title VII jurisprudence.

Under Title VII, it is an unlawful employment practice for an employer to discriminate against any individual with respect to her terms, conditions or privileges of employment because of such individual's race. *See* 42

U.S.C. 2000e-2 (A)(1). In a disparate treatment case, ultimate liability depends on "whether the protected trait [(in this case race)] actually motivated the employer's decision." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000); *citing Hazen Paper Company v. Biggins*, 507 U.S. 604, 610 (1993). Stated simply, the plaintiff has the ultimate burden of proving that the protected trait must actually have played a role in the decision making process and had a determinative influence on the outcome. *Id.*

In order to establish liability in this case, Respondent had to prove that the decisions made by her direct supervisor, Carol Pierce, regarding the reassignment of Respondent's job duties and the limitation on her personal phone calls at work were *actually based*, in whole or in part, on Respondent's race. Anything short of this evidentiary mark opens the door for Title VII to be misused by courts and juries to reach into the employment relationship and dispense their own subjective sense of work-place justice using criteria not authorized by Congress. Historically, when disparate treatment cases have been brought under Title VII, the issue has never been whether the court or jury believed the plaintiff was treated in manner which was unfair, distasteful or even immoral, but rather whether there was evidence to illustrate that the plaintiff was treated in an illegal manner. *See supra.*

In this case, the Fifth Circuit affirmed the district court's denial of Petitioner's Rule 50 motion in absence of racial bias on the party of the decision-maker. As noted, it was undisputed at trial that no direct or circumstantial evidence of racial bias or animus existed respecting Mrs. Pierce. It was further established at trial that Mrs. Pierce was a Vice-President of Rio Petroleum and was the sole decision maker regarding personnel matters in the office. The lack of any direct or circumstantial evidence on the part of Mrs. Pierce was raised by Petitioner in its initial and renewed Rule 50 Motions for Judgment as a Matter of Law. These Motions

were denied by the district court and appeal was taken to the Fifth Circuit. In reviewing the issue, the Fifth Circuit acknowledged the fact that no evidence regarding racial bias or animus on the part of Mrs. Pierce existed, but the Court nonetheless imputed a racial motivation to her decisions on the basis of remarks allegedly made by Barrett Pierce, who was the President of Rio Petroleum, and Mr. Walker who was a Vice-President of the company.

In its Brief filed with the Fifth Circuit, Petitioner characterized the remarks attributable to Mr. Pierce and Mr. Walker as "stray remarks" which are not, as a matter of law, probative of an unlawful racial motivation respecting the employment decisions at issue. The Fifth Circuit disagreed in light of this Court's holding in *Reeves v. Sanderson Plumbing, supra,* and concluded in a footnote that:

> Rio Petroleum argues that the comments about Brown's choice to celebrate certain holidays and the label "little black nanny" should not be weighed as evidence of racial bias because they were 'stray remarks.' A reasonable jury may have concluded that the remarks concerning the celebrations indicated racial animus and that the speaker's 'Walker and Barrett Pierce' exerted influence over the decision maker, Carol Pierce. The remarks were therefore circumstantial evidence of racial discrimination by Rio Petroleum which the jury could consider. *See generally, Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000)(explaining that *Reeves v. Sanderson Plumbing Products, Inc., [supra.]*, modified Fifth Circuit stray remark jurisprudence so that remarks which evidenced discriminatory animus made by a speaker who has leverage or influence of the

> decision maker may be considered circumstantial evidence of discrimination by an employer). On the other hand, "the little black nanny" label was coined by a coworker who did not evidence such influence at Rio Petroleum. We therefore agree that the coworker's reference to Brown as a "little black nanny" was a stray remark, which did not evidence bias on the part of the decision maker.

(Appendix at pp. 2 and 3, n. 1). However, the Court's conclusion as outlined in this paragraph is contrary to the record in this case. Interestingly, the Court does not explain how the jury could have found evidence of the "leverage" exerted by Mr. Walker or Mr. Pierce over Mrs. Pierce regarding the specific personnel matters at issue in this case. In fact, the Court did not identify any causal connection between comments made by Mr. Pierce and Mr. Walker and the relevant personnel decisions made by Ms. Pierce. In such a case as the one at bar, imputing discriminatory intent to a neutral decision-maker in the absence of a causal connection with respect to the timing, substance and circumstances under which alleged discriminatory comments are made and the employment action places the disputed verdict on an illusory base which is not sanctioned by Title VII.

The mere fact that a disparaging remark may have been made by a non-decision-maker in the work-place does not, standing alone does not, nor could it, indicate that a specific employment decision was unlawfully motivated. "Typically, statements made by 'one who neither makes nor influences [a] challenged personnel decision are not probative in an employment discrimination case." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1rst Cir. 2000); *citing, Medina-Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1rst Cir. 1990). The "stray

remarks" doctrine exists to distinguish between those comments that are probative of a possible illegal motive and those that are not probative, but merely superfluous to the case. Contrary to early speculation, this Court did not strike down the "stray remarks" doctrine by its decision in *Reeves v. Sanderson Plumbing, supra.* This fact was recently noted by the Fifth Circuit in *Auguster v. Vermilion Parish School Board*, 249 F.3d 400, 404 (5th Cir. 2001) in which the Court observed that the doctrine was still in tact. Nonetheless, the Court failed to analyze the remarks attributable to Mr. Pierce and Mr. Walker pursuant to its own standard established in *Brown v. CSC Logic, Inc.*, 82 F. 3d 651 (5th Cir. 1996). According to *Brown*, "for comments in the work-place to provide sufficient evidence of discrimination, they must be 1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time and to the [employment action]; 3)made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue."

In reaching its conclusion that sufficient evidence of unlawful bias existed in this case the Fifth Circuit bypassed its own stray remarks analysis. In doing so, the Court simply dispensed with the issue of whether an appropriate nexus existed between the comments and Ms. Pierce's decisions. However, such a nexus must exist in order to uphold the denial of a Rule 50 motion. With the exception of the first element, none of the comments attributed to Mr. Pierce or Mr. Walker satisfy this test. Specifically, the remarks were not made by individuals with authority over the decisions at issue nor were the remarks proximate in time or related to the Ms. Pierce's decisions regarding Respondent's conditions of employment. As a matter of law, these comments simply do not evidence racial animus respecting the decisions at issue and it was error for the Court to affirm the District Court's denial of Petitioner's Rule 50 motions based upon their existence

However, more troubling was the Fifth Circuit's use of the subject comments to impute discriminatory intent to Ms. Pierce. Given the undisputed record in this case, the imputation of an unlawful racial motivation was unjustified and in conflict with existing case-law.

Several federal circuit courts of appeals have held that remarks made by individuals other than the ultimate decision maker may be used as evidence of racial bias or animus under conditions in which the formal decision maker (in this case Mrs. Pierce) was not independent, but influenced by one or more individuals acting with unlawful motives. In such cases, the central evidentiary requirement is proof that the decision maker merely acted as an outlet or "conduit" for the unlawful motivation of superior or subordinate members of the employer's organization. Such proof would, at minimum, include a showing of a nexus between the comments and the decision at issue and a showing of sufficient leverage or influence actually exerted and the formal decision-maker.

Seventh Circuit Court Judge, Richard Posner has coined the phrase "cats-paw" to describe the situation in which evidence of an unlawful motivation exhibited by a corporate superior can be probative of an unlawful motivation respecting an employment decision even in the complete absence of an unlawful motivation on the part of the formal decision maker. Specifically, "if [the decision maker] acted as the conduit of [the superior's] prejudice - his cat-paw - the innocence of [the decision maker] would not spare the company from liability." *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). However, in order to make the so-called "cat's -paw" analysis, the plaintiff must establish a causal link between the superior's unlawful purpose and the subordinate decision maker's ultimate action. In other words, there must be evidence that the decision maker did not act upon her own volition, but rather merely "rubber stamped" the unlawful desires of the superior who

would have been, in fact, the actual decision maker who has attempted to insulate himself or herself by delegating the formal decision making process to an individual over which they have influence. *Id.* In such a case, the "actual decision-maker" is not the formal decision-maker, but rather his or her superior. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at p. 152; *see also, Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998); *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998).

Similarly, the circuit courts have also held that the unlawful motivation of subordinates can be imputed upstream to the official decision maker under circumstances in which subordinate employees pursue unlawful ends by controlling information, evaluations and other data used by upper management to make decisions regarding the plaintiff's employment. *Kendrick v. Penske Transp. Services. Inc.*, 220 F.3d 1220 (10th Cir. 2000) ("other circuits have recognized that a defendant may be held liable if the manger who discharged the plaintiff merely acted as a rubber stamp or the cat's paw for a *subordinate employee's* prejudice even if the manager lacks discriminatory intent"); *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998)("evidence of a subordinate [employee's] bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence"); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993).

Though the various circuits have adopted the cat's-paw analysis and thereby established precedent that a decision maker cannot be used as a conduit for an otherwise unlawful motivation from either superior or subordinate employees within the employer's organization, in both scenarios there must be evidence of "leverage" or "influence" over the neutral decision maker in order to create the causal connection which would justify the imputation of racial bias

regarding the decisions at issue. However, the courts of appeals have failed to establish any criteria respecting the type and amount of such evidence that would permit imputation. Consequently, the factual circumstances in which imputation has been allow varies substantially and the various courts of appeals have failed to arrive at any consensus. However, all of the courts of appeals agree that some amount of leverage evidence is necessary. Nonetheless, in this case, the Fifth Circuit imputed racial bias to Carol Pierce in the complete absence of any proof of leverage or influence on the part of Mr. Pierce or Mr. Walker regarding her decisions at issue. Quite the contrary, the undisputed evidence reveals that Ms. Pierce acted independently as the final decision maker regarding the Respondent's job duties and excessive personal phone calls.

Action by this Court is necessary to clarify the parameters of the stray remarks doctrine and set guidelines concerning the type and quantum of evidence necessary to permit the imputation of an unlawful motivation pursuant to the "cats-paw" analysis. Petitioner concedes the need for imputation in the proper circumstances; however, in cases such the one at bar, the analysis goes too far and permits the finding of unlawful discrimination in the absence of any rational basis for concluding that race discrimination has occurred. If, for example, it was shown at trial that either Mr. Pierce or Mr. Walker instructed Ms. Pierce to take the action she did or controlled the information used by her in making the decisions, imputation may have been reasonable. However, given the undisputed fact that Ms. Pierce exercised her position over personnel matters, specifically those involving the Respondent, with independence and autonomy. She was an officer and part-owner of the company and as such could exercise her own personal judgment respecting the issues the company faced concerning the Respondent. To impute an unlawful motivation to her on the basis of comments attributed to Mr. Pierce and Mr. Walker is patently

unreasonable and denies the undisputed fact that she possessed and exercised her own autonomy respecting the specific decisions at issue as a matter of law without any factual or legal justification.

CONCLUSION

This case presents important questions regarding the proper legal standard and quantum of evidence necessary to impute discriminatory intent to an individual decision-maker in disparate treatment cases brought under Title VII. Though several courts of appeals have held that such imputation is proper is certain cases, the courts have taken various approaches on the issue. In this case, the Fifth Circuit Court of Appeals has imputed discriminatory intent in the absence of any direct or circumstantial evidence of racial bias or animus on the part of the decision-maker on the basis of stray remarks made by non-decision makers without any showing of "leverage or "influence" concerning the decisions at issue.

RESPECTFULLY
SUBMITTED,

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(Any footnotes trail end of each document)
No. 99-11194

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

YOLANDA N BROWN,
Plaintiff -Appellee,

VERSUS

RIO PETROLEUMI INC, ET AL
Defendants

RIO PETROLEUM, INC; JOHN WALKER, JR
Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas
(2 ;97-CV-440)

Before DUHÉ and PARKER, Circuit Judges and LINDSAY, District Judge .*

PER CURIAM**

Defendants Rio Petroleum, Inc. and John walker, Jr. appeal the district court's denial of Defendants' motions for judgment as a matter of law, for new trial and for remittitur, as well as the damages awarded by the jury to Plaintiff Yolanda N. Brown. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Brown was employed by Rio petroleum from January 1992, to September 1996, to perform receptionist and clerical

duties. Rio Petroleum is a small company in Amarillo, Texas, engaged in the business of exploration, production, and sale of oil and natural gas. Brown was the only African-American in an office staff of nine (and later in Brown's tenure, ten) employees. Brown received raises and incentive bonuses, participated in company social functions, and enjoyed good relations with her supervisors and co-workers at the beginning of her employment.

Over time, her clerical job duties were assigned to other employees and she was reassigned to perform janitorial and yard maintenance tasks. She also suffered humiliations including having mail repeatedly dropped on her from a second floor balcony, being questioned about her and her children's participation in Juneteenth and Martin Luther King, Jr. Day celebrations, and being referred to at work as "our little Black nanny."[1]

Brown was given a written separation notice in September 1996, signed by Rio Petroleum Vice President Carol Pierce that stated:

In your four years of employment with Rio, we have endeavored to have you perform various tasks. However, other than arranging birthday/party celebrations and attending receptionist activities during conference meetings, you failed to successfully perform and master tacks given you. These inabilities resulted in, the transference of work and responsibilities to others. Recall that I *have* had several conversations with you in the past regarding your job performance, and I have seen no improvement. Therefore, we must terminate your employment effective immediately

Brown brought suit pursuant to Title VII of the Civil. Rights Act of 1964, as amended1 42 U.S.C. § 2000e (1994), alleging that Rio Petroleum discriminated against her on the basis of race and sex. Brown also asserted causes of action against

Rio Petroleum President Barrett Pierce for sexual harassment and intentional infliction of emotional distress, and against Rio petroleum Vice President John Walker, Jr. for assault and battery.

The case was tried to a jury. At the close of Brown's case-in-chief, the district court granted judgment as a matter of law to Defendants on all claims except Brown's allegation that she had been subjected to disparate treatment on account of race with regard to conditions of employment other than pay and the allegation that Walker had committed assault and battery against her by dropping mail on her. The jury returned a verdict in Brown's favor on the two remaining claims and awarded her $60,000 for mental anguish on her disparate treatment claim, as well as $15,000 for mental anguish and $25,000 in exemplary damages on the assault and battery claim against Walker. Defendants filed motions for judgment as a matter of law or for new trial on Brown's remaining claims, which the district court denied. The district court granted in part and denied in part Defendants' motion for remittitur, reducing the jury verdict against the company to $50,000, the applicable statutory cap.

II. ANALYSIS

A. Standard of review

Rio Petroleum appeals the district court's denial of its motion for judgment as a matter of law, in which it alleged that the trial evidence was not sufficient to support a verdict for Brown on her disparate treatment claim. We review that denial *de novo*, *Sharp v City of Houston*, 164 F.3d 923, 928 (5th Cir. 1999), considering all of the evidence in the record. *Reeves* v. Sanderson *Plumbing Prods.., Inc.*, 530 U.S. 133, 120 5. Ct. 2097, 2110 (2000). We view the evidence and all reasonable inferences in favor of the non-movant; if reasonable persons could differ in their interpretation of the

evidence, the motion should be denied. *Id.* only if the facts and reasonable inferences are such that reasonable jurors could not reach a contrary verdict may the court properly grant such motion. Id.

Rio Petroleum moved, in the alternative, for new trial which the district court also denied. We affirm that denial unless the district court abused its discretion in refusing to find that the verdict is against the great weight of the evidence. *Whitehead* v. *Food Max of Miss., Inc.*, 163 F.3d 265, 269 (5th Cir. 1996).

Rio Petroleum also complains that, although the district court granted its motion for remittitur, it erred in failing to remit the damages awarded by the jury to a nominal sum. We review the district court's order of remittitur for abuse of discretion. *See Denton v. Morgan,* 136 F.3d 1038, 1046 (5th Cir. 1996).

B. Disparate Treatment Claim

Brown alleged, and the jury found, that Rio Petroleum intentionally discriminated against her because of her race in the conditions of her employment. The district court instructed the jury that Brown "must prove that Rio Petroleum considered her race as a motivating factor in making one or more decisions concerning the conditions of her employment." The conditions of employment which Brown alleged arose from intentional racial discrimination included the assignment of job duties, a reprimand for making personal phone calls, and failure to expeditiously file a worker's compensation claim.

Brown had the burden of proving all the elements of a prima facie case of discrimination. The district court instructed the jury that Brown must prove:

1. That she was denied or deprived of conditions of employment;
2. That she was qualified to receive or retain the conditions of employment denied; and
3. That the conditions of employment she was denied were instead given to other similarly situated employees who were not members of her protected class (African-American); and
4. That Plaintiff's race was a motivating factor in the decision to deny her the conditions of employment.

See St. Mary's Honor Center v Hicks, 509 U.S. 502, 515 (1993).

Rio Petroleum argues on appeal that Brown's evidence did not establish a prima facie case of disparate treatment concerning the delay jn filing her worker's compensation claim. That claim arose from an on-the-job injury Brown sustained-in 1995, when she was involved in an automobile accident while running an errand for Rio Petroleum. Brown testified that she reported the injury to her supervisors, who advised her to contact the auto insurance company rather than filing a workers' compensation claim. Brown raised the issue again in September 1996, during her termination interview, after which the claim was promptly tiled. Rio Petroleum points out that the record contains no evidence that Brown's worker's compensation claim was treated differently than claims by similarly situated non-minority co-workers. The trial testimony established only that worker's compensation claims by injured "pumpers" were generally prepared and filed within a day. The pumpers were not office workers and therefore not similarly situated to Brown. Further, there was no evidence identifying the race of any injured pumper. The

record supports Rio Petroleum's contentions on both counts. That is, Brown did not offer evidence that the pumpers were similarly situated- in fact, there is undisputed evidence that they were not similarly situated nor that they were not African-Americans

Rio Petroleum next argues that Brown's claim regarding personal use of the phone did not involve actionable conduct on the part of Rio Petroleum. Brown testified that, while other non African-American clerical personnel were allowed personal phone calls at work, she was singled out to be chastised for personal phone use. Rio Petroleum contends that when Brown's supervisor counseled her about excessive personal phone use during a performance evaluation, it was not an employment action rising to the level of Title VII scrutiny. Similarly, Rio Petroleum argues that there was no evidence that the reassignment of job duties resulted in any "detriment" to Brown's job and therefore was not an actionable employment decision.

We must first decide if Brown's allegations amount to discrimination with respect to the conditions of her employment, as that term is used in 42 U.S.C. 5 2000e-2(a)(1). Appellant's contention that Brown's claims do not raise viable claims of discrimination under Title VII is bottomed on language and reasoning from cases involving retaliation claims under § 2000e3(a). In that context, we have held that Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions. See, e.g., Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995). We mentioned as examples of ultimate employment decisions hiring, granting leave, discharging, promoting, and compensating an employee. Id. Appellant's argument in this regard fails because the retaliation jurisprudence they rely on is not on point; this appeal does not concern a retaliation claim. Rather, Brown

prevailed at trial on her allegation that the conditions of her employment had been discriminatorily altered. Brown contends, and Rio Petroleum conceded at oral argument, that Title VII makes it unlawful to discriminate against an individual with regard to the conditions of employment whether or not an employer has made an ultimate employment decision on the basis of race. Verbal intimidation, ridicule, and insults may alone be sufficiently severe or pervasive to alter the conditions of employment and violate Title VII. See *DeAngelis* v. *El.* Paso Nun. *Police Officers Ass'n,* 51 Y.3d 591, 593 (5th Cir. 1995), *citing Harris V. Forklift Systems, Inc.,* 510 U.S. 17, 22 (1993). Brown's allegations that her job duties were reassigned in a discriminatory manner and that she was denied the same use of the telephone for personal calls allowed to non-African-American employees, taken as a whole, state a viable Title VII claim of discrimination with regard to the conditions of her employment. See *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761 (1998) (holding that a Title VII claimant can prove her claim by establishing a tangible employment action, that is, an employment action which "constitutes a significant change in employment stauts, such as hiring, firing, failing to promote, *reassignment with significantly* different *responsibilities,* or a decision causing a significant change in benefits." (emphasis added))

Next we must determine whether the district court erred in concluding that Brown established a prima facie case of discrimination. Specifically, Rio Petroleum contends that there is no evidence from which the jury could conclude that Brown was qualified to perform the job duties that were reassigned to other employees. We address this issue along with Rio Petroleum's parallel argument: its proffered non-discriminatory reason for reassigning Brown's job duties is that Brown was "not adequately performing her job duties."

First, Rio Petroleum transferred the responsibility of completing the Texas Railroad commission reports to a Caucasian employee hired after Brown. Brown prepared and filed the reports for approximately two years from the time she was initially hired. In an effort to establish that Brown was not qualified to perform that part of her job, Rio Petroleum relied on evidence that Brown made errors on nineteen of the reports that she prepared. However, the evidence did not show that the errors were serious or that, in order to be qualified for the job, one must produce error-free reports. Brown's training consisted only of a supervisor showing her how to do the reports for the first two or three months. Based on her supervisors' explicit assessment that she was satisfactorily performing this function, Rio Petroleum gave her a raise of $50.00 a month and additional responsibility. Over time, as she mastered her assigned tasks, Rio Petroleum added responsibility for division orders, geology files, and some accounting functions. Viewing this evidence in the light most favorable to Brown, a rational jury could have concluded that Brown was qualified for these assignments, given that Rio Petroleum, rather than disciplining her, providing her with additional training or indicating in any way that the quality of her work was unsatisfactory, continued to add to her job responsibilities.

In addition to transferring the Railroad Commission reports, Brown's responsibility for the land and well files was reassigned to a subsequently hired Caucasian clerical worker. Brown's phone duties were decreased, but not eliminated when Rio Petroleum installed an automated phone system. In place of these various duties, Brown was required to water trees, even though there was a sprinkler system in place. She was required to sweep and clean the basement and wash the windows, although Rio Petroleum had a janitorial service. She was also given the responsibility of caring for an infant when Rio Petroleum gave one of its other clerical workers permission to bring her baby to work. As a part of the

transferred duties, Rio Petroleum moved Brown's workstation from the front reception area to a desk faced toward the wall in the corner of the file room, with no phone or typewriter. She was told that she had continued responsibility f or receptionist duties. When she heard the phone ring, she had to get up and go to another employee's desk to answer it. When visitors arrived, she was summoned to the front to greet them and take care of any related receptionist duties.

Rio Petroleum cites evidence that Brown made errors in filing, in a bank deposit, in taking down phone messages and in distributing incoming faxes for the proposition that she was not qualified for the responsibilities that were transferred to other employees. While Brown did not deny making some errors, there is no evidence that Rio Petroleum considered Brown unqualified for receptionist duties. Indeed, Rio Petroleum even acknowledged in her termination letter that she performed that job satisfactorily. Finally, the jury was free to disbelieve Rio Petroleum's contention that the files were transferred because they were "a mess."

Based on the foregoing, we conclude that the record contained sufficient evidence to support the jury verdict for Brown on her claims of disparate treatment on the basis of reassigned job duties. Brown was the only African-American employee in Rio Petroleum's office and the only one subjected to the demeaning employment conditions described at trial. Moreover, a jury was free to reject Rio Petroleum's contention that Brown was simply an incompetent employee, particularly in light of evidence that she was given raises and additional duties during the early days of her employment after her supervisor concluded that she had mastered her original responsibilities. Therefore a reasonable jury could have concluded that race was a cause for Rio Petroleum's treatment of Brown. In sum, the evidence was sufficient to establish Brown's prima facie case and to rebut Rio

Petroleum's proffered non discriminatory reasons for its decisions. Reeves, 530 U.s. 923 (2000). Therefore, the district court did not err in denying Rio Petroleum's motion for judgment as a matter of law.

C. Challenge to the Amount of Damages Awarded by the Jury

Rio Petroleum and Walker[2] contend that the district court abused its discretion in failing to remit the jury award of damages to a nominal amount.

Rio Petroleum complains that the district court incorrectly stated in its remittitur order that "[trial] testimony established that Appellee was subjected to an offensive act of a sexual nature by Defendant Barrett W. Pierce, then President of Rio Petroleum, Inc. Rio Petroleum argues that they chose to leave the evidence of Pierce's misconduct unchallenged after the district court granted judgment as a matter of law on Brown's sexual harassment claim because that was the only claim to which it was relevant. The record does not support Rio Petroleum's argument. Brown specifically testified that Pierce singled her out for unwelcome sexual advances because she was African-American and that he did not subject her Caucasian co-workers to the same treatment because he believed that African-American females are "prostitutes" or "easy." Therefore, the district court did not err in crediting the uncontradicted evidence of Pierce's race-based sexual misconduct in evaluating the record for purposes of remittitur.

Rio Petroleum and Walker next contend that there is insufficient evidence to support the jury's award of damages to Brown for emotional distress because she did not show a sufficient causal connection between the statutory violation and the alleged injury. *See* Gore *v.* Turrer, 563 F.2d 259, 164 (5th Cir. 1977). Further, defendants contend that the

evidence did not show the specific nature and extent of the emotional harm caused by the violation. See Carey v. Piphus, 435 U.S. 247, 255-56 (1978).

In proving mental damages a claimant's testimony alone may not be sufficient to support anything more than a nominal damage award. Brady V. Port Bend County, 145 F.3d 691, 718 (5th Cir. 1998). Corroborating testimony or medical or psychological evidence may be necessary to meet the specificity requirements for establishing emotional distress damages. Id. "Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain,[3] humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown.' Id. "Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss or headaches.' Id. Brown's testimony included her subjective emotional responses to the various incidents, as well as a description of her inability to trust or have any kind of intimacy with any men as a result of her ordeal. She testified that she took classes to deal with the stress. Brown's two grown daughters also testified, corroborating and expanding the evidence that Brown's work at Rio Petroleum resulted in stress, weight loss, graying hair and anxiety. In addition, the jury was able to observe Brown when she broke down on the witness stand while testifying about the mail-drop assaults. Brown testified that Walker would call out to her from an upper balcony, and when she looked up, he would throw the mail down on her, calling out "air mail," laughing and hitting her in the face. This activity continued, even after she specifically asked him to stop. She testified that it was degrading, especially on the occasions when he did it in front of strangers or in front of her daughter. We conclude that the evidence in this record supports the jury's award of compensatory and punitive damages based on Rio Petroleum's intentional discrimination in violation of Title VII and the assault and battery by Walker.

CONCLUSION

Based on the foregoing, we affirm the judgment for Brown.

AFFIRMED

Footnotes

*District Judge of the Northern District of Texas, sitting by designation.

**Pursuant to 3m CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

[1] Rio Petroleum argues that the comments about Brown's choice to celebrate certain holidays and the label "little Black nanny" should not be weighed as evidence of racial bias because they were "stray remarks." A reasonable jury may have concluded that the remarks concerning the celebrations indicated racial animus and that the speakers (Walker and Barrett Pierce) exerted influence over the decisionmaker, Carol Pierce. The remarks were therefore circumstantial evidence of racial discrimination by Rio Petroleum which the jury could consider. See generally Russell v. McKinney Hosp. Venture, 235 F.3d 219, 2000 WL 1785541 at *5-6 (5th Cir. 2000) (explaining that Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000) modified Fifth Circuit stray remark jurisprudence so that remarks which evidence discriminatory animus made by a speaker who has leverage or influence over the decisionmaker may be considered circumstantial evidence of discrimination by an employer). On the other hand, the "little Black nanny" label was coined by a co-worker who did not exert such influence at Rio Petroleum. We therefore agree that a co-worker's reference to Brown as a little Black nanny was a stray remark, which

did not evidence bias on the part of Rio Petroleum decisionmakers.

[2] On appeal, Walker contests the damages awarded, but not his liability on Brown's assault and battery claim.

[3] Brown's marriage ended in divorce during her employment at Rio Petroleum. However, because she did not attribute her marital stress to her problems at work, we do not consider that in determining the sufficiency of the evidence on damages.

CIVIL ACTION CAUSE NUMBER
2:97-CV-440-J

TN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRTCT OF TEXAS

AMARILLO DIVISION

YOLANDA N. BROWN,
PLAINTIFF

V.

RIO PETROLEUM, INC., et al.,
DEFENDANTS.

ORDER

This is a Title VII case, Before the Court are Plaintiff Yolanda N. Brown's motion for entry of judgment on the jury's verdict and Defendants' renewed motion f or judgment as a matter of law or, in the alternative, for a new trial. The Court will enter judgment for Plaintiff.

Plaintiff alleged intentional discrimination on the basis of her race (black) by Defendant Rio petroleum, Inc., Plaintiff's employer. She further alleged assault and battery by Defendant John Walker, Jr. The jury awarded Plaintiff $60,000 in, mental anguish damages against Defendant Rio Petroleum. The jury awarded $15,000 in actual damages and $25,000.00 in punitive damages against Defendant Walker.

Plaintiff concedes in her response to Defendants' motion that the jury's damage award against Rio Petroleum exceeds by $10,000 the statutory cap applicable to her Title VII claim. See 42 U.S.C § 1981a(b) (3) - Plaintiff agrees to Defendants'

request that the jury's award be remitted to a maximum of $50,000 in compensatory damages. She prays for judgment for $50,000 against Rio Petroleum and for $40,000 *against* Defendant Walker.

Plaintiff Yolanda Brown was hired by Rio Petroleum, Inc., as a receptionist and clerical office worker. During the relevant time Defendant Walker was a Rio Petroleum supervisor. Testimony From trial witnesses established that Plaintiff was reassigned from her inside office duties to menial outdoor tasks. Testimony established that Plaintiff was subjected to an offensive act of a sexual nature by Defendant Barrett W. Pierce, then President of Rio Petroleum, Inc. Testimony established that. She was battered by Defendant Walker, who dropped letters and packages upon her and her desk from a second floor balcony over her first floor work area.

The evidence at trial adequately established that Plaintiff was subjected to intentional discrimination in employment and was humiliated in front of co-workers and non-employees because of her race. The evidence established that Plaintiff Brown suffered emotional harm and mental anguish as a consequence of these acts. The evidence supports the jury's finding of Rio Petroleum's intentional discrimination in violation of Title VII and the assault and battery by Walker. The evidence supports the jury's award of compensatory and punitive damages. Defendants' motion for a new trial or for a take nothing judgment on the basis of no evidence or insufficient evidence to support the jury's findings of liability and/or damages is therefore denied. Cf. Patterson vs. P.H.P. Healthcare Corp, 90 F.3d 927, 937-41 Cir. 3995), cert. denied, 117 S.Ct. 767 (1997) (an award of more than nominal mental anguish damages requires corroborating testimony of the existence, nature, and. severity of the emotional harm suffered by a Title VII plaintiff).

Given Plaintiff's concession that the applicable statutory cap limits recoverable compensatory damages to maximum of $50,000 and based upon the corroborating trial testimony and evidence of the nature, severity and duration of emotional harm and mental anguish suffered by Plaintiff Yolanda Brown, Plaintiff's motion for judgment is granted. The Court will enter judgment for Plaintiff against Defendant Rio Petroleum, Inc., in the amount of $50,000 arid against Defendant John Walker, Jr. in the amount of $40,000.

It is SO ORDERED.
Signed this the 29th day of September, 1999.

MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

No. 99-11194

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

YOLANDA N. BROWN
Plaintiff - Appellee

v.

RIO PETROLEUM INC.; ET AL.
Defendants

RIO PETROLEUM INC.; JOHN WALKER, JR.
Defendants - Appellants

Appeal from the United States District court of the Northern District of Texas, Amarillo

ON PETITION FOR REHEARING

Before DUHÉ and PARKER, Circuit Judges and LINDSAY, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Footnotes

*District Judge of the Northern District of Texas, sitting by designation.

Supreme Court, U.S.
FILED
NOV 21 2001
OFFICE OF THE CLERK

No. 01-671

IN THE

Supreme Court of the United States

RIO PETROLEUM, INC.,

Petitioner,

v.

YOLANDA BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether it was error for the United States Fifth Circuit Court of Appeals to uphold the District Court's denial of Petitioner's initial and renewed Rule 50 motions regarding Respondent's disparate treatment case by imputing an unlawful discriminatory motive to the Respondent's direct supervisor, who was the sole decision-maker, in the absence of any evidence of racial animus on the part of the supervisor? According to Petitioner, such a holding runs counter to the very letter and spirit of Title VII jurisprudence and is contrary to the Fifth Circuit's own decisions in *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), and *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996). Petitioner avers further that there is utter confusion and disarray among the circuit courts in ascertaining with predictability what quantum of evidence is necessary to permit the imputation of an unlawful motive pursuant to the so called "cats-paw" analysis. As a result, the Petitioner is imploring this Court to utilize this case as the test case to clarify the parameters of the stray remarks doctrine.

While both the Fifth Circuit's ruling and the record referenced attributive remarks in discussing aspects of Respondent's prima facie case, none of the remarks in question standing alone was construed and deemed by the Fifth Circuit as being dispositive of the issue whether the Petitioner had intentionally discriminated against the Respondent with respect to a term or condition of her employment. The instant case is not a remark case. And, it was not so decided either. As Petitioner correctly points out, the remark discussion is footnoted in the Court's opinion. The Fifth Circuit's ruling is proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

THE RULING DOES NOT CONFLICT WITH *RUSSELL v. McKINNEY*

In a veil and transparent maneuver to arrest this Court's attention, Petitioner argues that the Fifth Circuit's ruling is directly at odds with the Court's own holding in *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000). Petitioner argues further that Court's holding in the instant case is not in accord with *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996). Petitioner is referring of course to the analytical framework utilized in stray remark cases. Petitioner however, misapplies *Brown v. CSC Logic, Inc.* to the instant case. The four-part test of *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996), was originally devised in order to address a situation in which one of the elements of the plaintiff's prima facie case is missing and the plaintiff attempts to remedy the deficiency by adducing evidence of discrimination in the form of remarks evidencing animus or bias. *Id.* Such however, is not the situation in the instant case.

As to the charge that the Court's decision in the instant case is at odds with its holding in *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), that too is a stretch. The thrust of the Court's holding in *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000,) was that for the first time the Court reconciled its prior position of requiring a plaintiff to establish pretext including additional evidence (the so-called pretext-plus) in order to make a satisfactory showing of intentional discrimination. In light of the United States Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2108-09, 147 L. Ed. 2d 105 (2000), the Fifth Circuit fashioned that its pre-*Reeves* analytical framework needed adjustment. Contextually therefore, Petitioner misapprehends *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996) and its relevance to the present case.

The Court's posture is summed up eloquently by the following sentence. "[t]his pretext-plus requirement is contrary to the Court's holding that the employer's prevarication may be sufficient in many cases to demonstrate discriminatory animus." *Id.* "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id. See generally, Blow v. City of San Antonio, Texas*, 236 F.3d 293 (5th Cir. 2001); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993-94 (5th Cir. 1996).

In the instant case, Respondent's prima facie case was uncontroverted. Proffered additional testimonial evidence was unrebutted. These included relegating the Respondent to washing windows and watering trees when a sprinkler system existed and having the Respondent sweep and clean the basement break room when Petitioner employed janitorial services. The record was uncontroverted that nearly all of Respondent's clerical duties were reassigned and that the Respondent was the only African American employed by the Petitioner. She also was the only clerical staff employee sanctioned and disciplined for making personal phone calls. This evidence in addition to Respondent's prima facie case and not the "attributive remarks" constituted the basis for affirming the District Court Judge's holding.

THIS CASE CONTRIBUTES NOTHING TO REMARK JURISPRUDENCE

In their conclusion, Petitioner argues that the Fifth Circuit's ruling adds to the confusion that now permeates remark jurisprudence among the circuits. May be so. This however, is the wrong case to indulge Petitioner's invitation.

After considering the relevant facts and the applicable law, the Fifth Circuit properly held that Petitioner had intentionally discriminated against the Respondent. The Panel ruled, purely

and simply, and cognizant of the Court's own precedent and guidance from *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000), that when a prima facie case is made and additional evidence is proffered and adduced, the Court should not substitute its wisdom for that of the trier of fact, particularly where as here the case was tried on the merits to a jury. Consequently, this case contributes nothing to remark jurisprudence.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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